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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/798,739	03/10/2004	George D. Hermann	FGRTNA00602	6427
40518	7590	01/10/2008		
LEVINE BAGADE HAN LLP 2483 EAST BAYSHORE ROAD, SUITE 100 PALO ALTO, CA 94303			EXAMINER RYCKMAN, MELISSA K	
			ART UNIT 3773	PAPER NUMBER
			MAIL DATE 01/10/2008	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	Application No. 10/798,739	Applicant(s) HERMANN ET AL.	
	Examiner Melissa Ryckman	Art Unit 3773	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-4,7-9,11,22 and 23 is/are pending in the application.
- 4a) Of the above claim(s) 1-4,9,22 and 23 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 7,8,11 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |  |
|--|--|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. ____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | 5) <input type="checkbox"/> Notice of Informal Patent Application                      |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date <u>10/4/07</u> | 6) <input type="checkbox"/> Other: ____  |

### DETAILED ACTION

This office action is in response to claims and arguments filed 10/4/07. In office action dated 4/4/07 claims 1-4,9,22, and 23 were withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected species, species 4 does not have a fastening element, species 1-3 include a fastening element, claims 1-4,9,22, and 23 are directed towards species 1-3. There being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on 3/19/07.

### *Claim Rejections - 35 USC § 102*

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 7,8, and 11 are rejected under 35 U.S.C. 102(b) as being anticipated by Boughten et al. (U.S. Patent No. 5,014,407).

Claim 7:

Boughten teaches a tissue approximating device comprising: first and second jaw (12 and 14) members moveable toward one another, said first and second jaw members having inner surfaces facing toward one another other (Fig. 1), a tissue engaging rod (16), said tissue engaging rod having a tissue engaging portion that can extend generally out of the plane of coaptation in a first position (retracting arm 16), said

tissue engaging rod moveable a to a second tissue engaging position that transects the plane of coaptation (fig. 3A and Fig. 3B, 16 moves towards 20 and 22 when open) thereby positioning tissue contacted by the tissue engaging rod between the first and second jaw members (capable of positioning tissue).

Claim 8:

Boughten teaches said first jaw member includes a lumen extending longitudinally through at least a portion of the first jaw member (54, col. 5, ll. 7).

Claim 11:

Boughten teaches said tissue engaging rod is pivotally attached to said first and second jaw members (abstract ll. 4,5 – retractably coupled is pivoting).

***Response to Arguments***

Applicant's arguments filed 10/4/07 have been fully considered but they are not persuasive. The applicant generally argues the following:

- Boughten fails to disclose "positing tissue...between the first and second jaw members"
- Boughten's device is not configured to position the tube (16) between the jaw members (12 and 14).

The examiner respectfully disagrees with the applicant. Boughten is capable of performing the described function, as stated in the above rejection. The device of

Boughton is configured to position the tube (16) between the jaw members (12 and 14), as seen in Figs. 3A and 3B.

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Melissa Ryckman whose telephone number is (571)-272-9969. The examiner can normally be reached on Monday thru Friday 7:30-4:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jackie Ho can be reached on (571)-272-4696. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for

Application/Control Number:  
10/798,739  
Art Unit: 3773


Page 5

published applications may be obtained from either Private PAIR or Public PAIR.

Status information for unpublished applications is available through Private PAIR only.

For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

MKR

  
(JACKIE) TAN-LYEN HO  
SUPERVISORY PATENT EXAMINER